

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SONIA A. STRICKLIN,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

CASE NO. C07-5038FDB-KLS

REPORT AND
RECOMMENDATION

Noted for March 21, 2008

Plaintiff, Sonia A. Stricklin, has brought this matter for judicial review of the denial of her applications for disability insurance and supplemental security income (“SSI”) benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties’ briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Honorable Franklin D. Burgess’s review.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff currently is 37 years old.¹ Tr. 38. She has a high school education, has completed some college course work, and has past work experience as a motel housekeeper and machine operator. Tr. 21, 139, 144, 165, 178, 183.

¹Plaintiff’s date of birth has been redacted in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

On February 3, 2002, plaintiff protectively filed applications for disability insurance and SSI benefits, alleging disability as of June 5, 2001, due to low back and hip problems, depression and anxiety attacks. Tr. 16, 123-25, 138, 177. Her applications were denied initially and on reconsideration. Tr. 38-40, 45, 477-79. A hearing was held before an administrative law judge (“ALJ”) on March 3, 2005, at which plaintiff, represented by counsel, appeared and testified, as did a vocational expert. Tr. 543-76.

On September 22, 2005, the ALJ issued a decision, determining plaintiff to be not disabled, finding specifically in relevant part:

- (1) at step one of the sequential disability evaluation process,² plaintiff had not engaged in substantial gainful activity since her alleged onset date of disability;
- (2) at step two, plaintiff had “severe” impairments consisting of: left hip and low back strains, status-post thoracic vertebral fracture; a bipolar disorder; post traumatic stress disorder; and a substance abuse disorder;
- (3) at step three, none of plaintiff’s impairments met or equaled the criteria of any of those listed in 20 C.F.R. Part 404, Subpart P, Appendix 1; and
- (4) at step four, plaintiff had the residual functional capacity to perform a modified range of light work, with certain other non-exertional limitations, which did not preclude her from performing her past relevant work.

Tr. 16-22. Plaintiff’s request for review was denied by the Appeals Council on December 8, 2006, making the ALJ’s decision the Commissioner’s final decision. Tr. 7; 20 C.F.R. § 404.981, § 416.1481.

On January 23, 2007, plaintiff filed a complaint in this Court seeking review of the ALJ’s decision. (Dkt. #1-#5). Specifically, plaintiff argues that decision should be reversed and remanded for an award of benefits or, in the alternative, for further administrative proceedings, for the following reasons:

- (a) the ALJ erred in evaluating the medical evidence in the record;
- (b) the ALJ erred in finding that plaintiff’s impairments did not meet or equal the criteria of 20 C.F.R. Part 404, Subpart P, Appendix 1;
- (c) the ALJ erred in assessing plaintiff’s credibility;
- (d) the ALJ erred in assessing plaintiff’s residual functional capacity;
- (e) the ALJ erred in finding plaintiff capable of returning to her past relevant work; and
- (f) the ALJ erred in finding plaintiff capable of performing other work existing in

²The Commissioner employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step, the disability determination is made at that step, and the sequential evaluation process ends. Id.

1 significant numbers in the national economy.

2 The undersigned agrees the ALJ erred in determining plaintiff to be not disabled, but, for the reasons set
3 forth below, recommends that while the ALJ's decision should be reversed, this matter should be
4 remanded to the Commissioner for further administrative proceedings.

5 DISCUSSION

6 This Court must uphold the Commissioner's determination that plaintiff is not disabled if the
7 Commissioner applied the proper legal standard and there is substantial evidence in the record as a whole
8 to support the decision. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial evidence is
9 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson
10 v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d 1427, 1429 (9th Cir. 1985). It is more than
11 a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir.
12 1975); Carr v. Sullivan, 772 F. Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than
13 one rational interpretation, the Court must uphold the Commissioner's decision. Allen v. Heckler, 749
14 F.2d 577, 579 (9th Cir. 1984).

15 I. The ALJ's Evaluation of the Medical Evidence in the Record

16 The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the
17 medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in
18 the record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions
19 of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion
20 must be upheld." Morgan v. Commissioner of the Social Security Administration, 169 F.3d 595, 601 (9th
21 Cir. 1999). Determining whether inconsistencies in the medical evidence "are material (or are in fact
22 inconsistencies at all) and whether certain factors are relevant to discount" the opinions of medical experts
23 "falls within this responsibility." Id. at 603.

24 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings "must be
25 supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this "by setting out a
26 detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation
27 thereof, and making findings." Id. The ALJ also may draw inferences "logically flowing from the
28 evidence." Sample, 694 F.2d at 642. Further, the Court itself may draw "specific and legitimate inferences

1 from the ALJ's opinion." Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

2 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of
3 either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a
4 treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific
5 and legitimate reasons that are supported by substantial evidence in the record." Id. at 830-31. However,
6 the ALJ "need not discuss *all* evidence presented" to him or her. Vincent on Behalf of Vincent v. Heckler,
7 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original). The ALJ must only
8 explain why "significant probative evidence has been rejected." Id.; see also Cotter v. Harris, 642 F.2d
9 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

10 In general, more weight is given to a treating physician's opinion than to the opinions of those who
11 do not treat the claimant. Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of
12 a treating physician, "if that opinion is brief, conclusory, and inadequately supported by clinical findings"
13 or "by the record as a whole." Batson v. Commissioner of Social Security Administration, 359 F.3d 1190,
14 1195 (9th Cir. 2004); Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242
15 F.3d 1144, 1149 (9th Cir. 2001). An examining physician's opinion is "entitled to greater weight than the
16 opinion of a nonexamining physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion
17 may constitute substantial evidence if "it is consistent with other independent evidence in the record." Id.
18 at 830-31; Tonapetyan, 242 F.3d at 1149.

19 A. Dr. Cavenee

20 On December 28, 2001, plaintiff was evaluated by Gerald Cavenee, Ph.D., who noted that she had
21 "presented well" for, and "was on task and well oriented throughout" the evaluation. Tr. 303. Dr. Cavenee
22 found plaintiff to be "alert and responsive to questions," and "[h]er overall cognitive abilities" seemed
23 "unimpaired." Id. He felt that her described systems were "consistent with a diagnosis of depressive
24 disorder," and noted that psychological testing indicated "a severe level of depression." Id. Dr. Cavenee
25 concluded that plaintiff's depression and anxiety made "a return to work in the near future very unlikely."
26 Id.

27 On January 3, 2002, Dr. Cavenee completed a state agency psychological/psychiatric evaluation
28 form, in which he assessed plaintiff with the following diagnoses: major depressive disorder, recurrent and

1 severe, with some psychotic features; post traumatic stress disorder; and polysubstance abuse/dependence.
 2 Tr. 300. Dr. Cavenee felt that while plaintiff claimed “only occasional use now,” there was “possible self-
 3 medication of depression with some use of poylsubstances.” Id. He further felt plaintiff’s alcohol or drug
 4 abuse possibly exacerbated her other diagnosed conditions. Tr. 301.

5 In terms of cognitive limitations, Dr. Cavenee noted pressured and rambling speech during the
 6 mental status examination. Id. He found plaintiff to be markedly limited in her ability to understand,
 7 remember, and follow complex instructions, learn new tasks, exercise judgment and make decisions. Id.
 8 Dr. Cavenee also found her to be moderately limited in her ability to understand, remember, and follow
 9 simple instructions and perform routine tasks. Id. However, Dr. Cavenee did not feel the above cognitive
 10 limitations were most likely the result of alcohol or drug abuse. Id.

11 With respect to plaintiff’s social functioning, Dr. Cavenee found her to be markedly limited in her
 12 ability to respond appropriately to and tolerate the pressures and expectations of a normal work setting,
 13 control physical or motor movements and maintain appropriate behavior. Id. She was moderately limited
 14 in her ability to relate appropriately to co-workers and supervisors, interact appropriately in public contacts
 15 and care for herself. Id. Dr. Cavenee estimated plaintiff would be impaired to the degree described above
 16 for a period of 12 to 24 months. Tr. 302. However, he also believed mental health treatment likely would
 17 restore or substantially improve plaintiff’s ability to work for pay in a regular and predictable manner. Id.

18 The ALJ addressed Dr. Cavenee’s findings as follows:

19 . . . [Dr. Cavenee’s] assessment [of plaintiff’s mental functional limitations] is a bit
 20 uncertain because it apparently relied on the claimant’s subjective comments. Dr.
 21 Cavenee reported that the claimant had pressured rambling speech (exhibit 6F:3), but
 22 he did not actually find those symptoms at the interview (exhibit 6F:5). He also did not
 23 mention the degree to which the claimant’s rambling and confusion might be related to
 24 drug abuse. This report is not entirely convincing.

25 Tr. 18. Plaintiff argues the ALJ erred in so discrediting Dr. Cavenee’s findings. The undersigned agrees.
 26 First, it is true as defendants points out that a physician’s opinion premised to a large extent on a
 27 claimant’s subjective complaints may be discounted where the record supports the ALJ in discounting the
 28 claimant’s credibility. See Tonapetyan, 242 F.3d at 1149; see also Morgan v. Commissioner of the Social
Security Administration, 169 F.3d 595, 601 (9th Cir. 1999).

“A patient’s report of complaints, or history,” on the other hand, “is an essential diagnostic tool,”
 and “[a]ny medical diagnosis must necessarily rely upon the patient’s history and subjective complaints.”

1 Flanery v. Chater, 112 F.3d 346, 350 (8th Cir. 1997) (citation omitted). It is questionable, furthermore, to
 2 reject the findings of a psychiatrist or psychologist because those findings rely to at least some extent on a
 3 claimant's subjective complaints:

4 Courts have recognized that a psychiatric impairment is not as readily amenable to
 5 substantiation by objective laboratory testing as is a medical impairment and that
 6 consequently, the diagnostic techniques employed in the field of psychiatry may be
 7 somewhat less tangible than those in the field of medicine. In general, mental
 8 disorders cannot be ascertained and verified as are most physical illnesses, for the
 9 mind cannot be probed by mechanical devices in order to obtain objective clinical
 10 manifestations of mental illness.... [W]hen mental illness is the basis of a disability
 11 claim, clinical and laboratory data may consist of the diagnoses and observations of
 12 professionals trained in the field of psychopathology. The report of a psychiatrist
 13 should not be rejected simply because of the relative imprecision of the psychiatric
 14 methodology or the absence of substantial documentation, unless there are other
 15 reasons to question the diagnostic technique.

16 Sanchez v. Apfel, 85 F. Supp.2d 986, 992 (C.D. Cal. 2000) (quoting Christensen v. Bowen, 633 F.Supp.
 17 1214, 1220-21 (N.D.Cal.1986)); see also Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987).

18 In addition, the performance of a mental status examination on its own has been found to constitute
 19 a proper foundation on which to base a medical diagnosis. See Clester v. Apfel, 70 F.Supp.2d 985, 990
 20 (S.D. Iowa 1999) ("The results of a mental status examination provide the basis for a diagnostic
 21 impression of a psychiatric disorder, just as the results of a physical examination provide the basis for the
 22 diagnosis of a physical illness or injury."). Here, Dr. Cavenee, regardless of the extent to which he may
 23 have relied on plaintiff's subjective complaints, also performed a mental status examination. In addition,
 24 as explained in further detail below, the ALJ erred in assessing the credibility of plaintiff's subjective
 25 complaints. It also is not clear that the mental functional limitations found by Dr. Cavenee were due to his
 26 reliance on plaintiff's subjective complaints, as opposed to the mental status examination he performed.

27 As noted above, another reason why the ALJ found Dr. Cavenee's report unconvincing was
 28 because Dr. Cavenee did not actually mention plaintiff's pressured and rambling speech during the mental
 status examination performed on December 28, 2001, or indicate the degree to which those symptoms
 were due to plaintiff's drug abuse. It is these stated reasons for rejecting Dr. Cavenee's findings, however,
 that are unconvincing. First, the report for the December 28, 2001 interview was written on the same date
 as Dr. Cavenee completed the psychological/psychiatric evaluation form. As such, it makes more sense to
 read the former document together with the latter – in which plaintiff's pressured and rambling speech are
 noted – than separately.

1 Second, Dr. Cavenee gave no indication plaintiff's pressured and rambling speech were affected by
2 her polysubstance abuse. Indeed, Dr. Cavenee's notation regarding these symptoms appear in the
3 cognitive factors section of the evaluation form in which it also is noted, as discussed above, that
4 plaintiff's cognitive limitations most likely were not the result of such abuse. Tr. 301. Thus, contrary to
5 the ALJ's findings on this issue, it seems fairly clear from Dr. Cavenee's report that he did not feel
6 plaintiff's alcohol and drug abuse had any specific impact on her pressured and rambling speech.
7 Accordingly, the undersigned finds the ALJ erred in discounting Dr. Cavenee's findings.

8 B. Dr. Ekemo

9 Dr. Kathie Ekemo, Ph.D., conducted a psychological evaluation of plaintiff in early and mid-March
10 2002. During the mental status examination, Dr. Ekemo found plaintiff's mood to be depressed, and her
11 affect to be congruent with her mood. Tr. 309. However, plaintiff's thoughts were "often logical and goal
12 directed," and her speech was normal in terms of rate and volume. Id. While her fund of information was
13 poor, she was oriented, her memory was fair, and her comprehension and concentration were both fair to
14 good. Tr. 309-10. Dr. Ekemo found that she was able to follow a three-step command, and appeared to
15 understand all questions asked of her. Tr. 309.

16 Psychological testing showed plaintiff to be in the low average range of intelligence, and to be in
17 the "[s]evere" range of depression. Tr. 310-11. Dr. Ekemo diagnosed her with a "Bipolar I Disorder, Most
18 Recent Episode Depressed, Severe with Psychotic Features," a chronic post traumatic stress disorder, and
19 polysubstance abuse. Tr. 311. She further assessed plaintiff as having schizotypal personality features, and
20 a global assessment of functioning ("GAF") score of 31. Id. Dr. Ekemo deemed plaintiff's prognosis to be
21 guarded, and felt that monitoring for suicidal risk was "a priority." Tr. 312. She also expressed concern
22 that plaintiff's "emotional lability and depression" would "interfere with her ability to keep up with
23 payment of bills." Id. Dr. Ekemo concluded her report as follows:

24 Ms. Stricklin has demonstrated an ability to reason that appears commensurate
25 with her intellectual ability. She is able to understand normal conversation and she
26 does have some insight into her current condition. Her memory is fair to good,
27 however she appears to have periods when she forgets periods of time. This is
28 probably related to the Posttraumatic Stress Disorder. Ability to concentrate is
variable, and appears to be fair, at best. Her concentration is disrupted by intrusive
thoughts related to childhood abuse. She is socially anxious and feels that she cannot
function when others are watching her. Her mental processing speed seems to be slow,
and is most probably related to her symptoms of depression, which are severe. Social
functioning is severely impaired by her mental health issues. Without proper
psychiatric intervention, she is not expected to improve in this area. These deficits

1 limit her ability to maintain gainful employment as well [sic] interfere with her
2 adaptive functioning.

3 Id.

4 In addressing Dr. Ekemo's findings, the ALJ focused primarily on the GAF score with which Dr.
5 Ekemo assessed plaintiff, stating that:

6 That [GAF] level is consistent with disability, and with Dr. Ekemo's comments that the
7 claimant had fair but variable and disrupted concentration and memory, and very
8 impaired social functioning (exhibit 7F:6). Dr. Ekemo indicated that the claimant's use
of drugs was declining but she did not indicate the degree to which the substance abuse
affects the GAF of 31. This assessment is, of course, only subjective; but it does not
support a finding of significant limitations in light of the mental testing overall.

9 Tr. 18. Although it is not entirely clear what plaintiff means in asserting that the ALJ "totally contradicts"
10 herself in making these statements (Dkt. #17, p. 13), the undersigned does find the ALJ erred in evaluating
11 the findings of Dr. Ekemo as well.

12 With respect to the first reason the ALJ gives for discounting those findings, again the ALJ focuses
13 on a perceived failure by Dr. Ekemo to indicate the degree to which plaintiff's substance abuse affected
14 the GAF score she assessed plaintiff. It seems, however, that the ALJ may be creating an issue where
15 there is none. Dr. Ekemo gave no indication that plaintiff's substance abuse, which she found to be
16 declining, had any effect on her mental functioning. Yet the ALJ appears to be faulting Dr. Ekemo for
17 failing to find one. As such, the undersigned agrees with plaintiff that the ALJ appears to improperly be
18 substituting his own opinion for that of Dr. Ekemo. See Gonzalez Perez v. Secretary of Health and Human
19 Services, 812 F.2d 747, 749 (1st Cir. 1987) (ALJ may not substitute own opinion for findings and opinion
20 of physician); see also McBrayer v. Secretary of Health and Human Services, 712 F.2d 795, 799 (2nd Cir.
21 1983); Gober v. Mathews, 574 F.2d 772, 777 (3rd Cir. 1978).

22 The weight of the medical opinion source evidence in the record, furthermore, fails to indicate
23 plaintiff's substance abuse had any actual impact on her cognitive abilities. While two non-examining
24 consulting psychologists did find plaintiff had certain marked limitations in terms of her social functioning
25 with drug and alcohol abuse, no treating or examining psychologist or psychiatrist in the record found any
26 limitations, cognitive or otherwise, stemming therefrom, marked or otherwise. See Tr. 300-03, 308, 311-
27 12, 328, 330, 333-34, 349-50, 354. In addition, as noted above, even the two non-examining psychologists
28 only found the presence of such limitations with respect to plaintiff's social, as opposed to cognitive,

1 functioning. However, the aspects of Dr. Ekemo's and Dr. Cavenee's reports the ALJ criticized concern
2 plaintiff's cognitive limitations.

3 As to the ALJ's last comment – that the assessed GAF score did not support a finding of significant
4 limitations in light of the mental testing overall – no explanation for this conclusion is given. For example,
5 the ALJ does not set forth what specific aspects of the mental status examination or psychological testing
6 supports an opposite conclusion. Indeed, Dr. Enkemo expressly notes that plaintiff was “tearful
7 throughout much of the interview,” and that it was “very difficult for her to regroup from her agitated and
8 tearful state to resume testing.” Tr. 309. In addition, the ALJ does not address the other significant mental
9 functional limitations Dr. Enkema found, including her opinion that plaintiff's mental “deficits” limited
10 her ability to maintain gainful employment and interfered with her adaptive functioning. Tr. 312.

11 C. Dr. Nelson

12 Plaintiff was examined by Paul Nelson, Ph.D., in early April 2004. Dr. Nelson diagnosed her with
13 moderate to severe, recurrent major depression, a pain disorder, and methamphetamine dependence in
14 partial remission. Tr. 350. In terms of cognitive functioning, Dr. Nelson noted that she had recent memory
15 problems, difficulty in concentrating, problems with her abstract reasoning ability, and poor impulse
16 control, judgment and decision-making ability. Tr. 349. Specifically, he found plaintiff to be markedly
17 limited in her ability to understand, remember and follow complex instructions, learn new tasks, and
18 exercise judgment, and moderately limited in her ability to perform routine tasks. Id.

19 With respect to social functioning, Dr. Nelson noted that plaintiff had poor eye contact, a depressed
20 mood, poor insight, and again poor judgment. Id. Her speech was normal, however, she had goal-directed
21 thinking, and she experienced no delusions or hallucinations. Id. Dr. Nelson found plaintiff to be severely
22 limited in her ability to respond appropriately to and tolerate the pressures and expectations of a normal
23 work setting, and markedly limited in her ability to respond appropriately to co-workers and supervisors,
24 interact appropriately in public contacts, control physical or motor movements, and maintain appropriate
25 behavior. Id. He further found her to be moderately limited in her ability to care for herself. Id.

26 Dr. Nelson thought plaintiff would be so limited for a period of six months to one year, though he
27 also believed that mental health treatment likely would restore or substantially improve her ability to work
28 for pay in a regular and predictable manner. Tr. 351. Currently, however, Dr. Nelson found plaintiff to be

1 “impaired from sustained gainful employment.” Tr. 354. In discounting Dr. Nelson’s opinion because the
2 basis for it was “not entirely clear,” the ALJ went on to state:

3 The claimant presented as somewhat tense and irritable. She had some difficulty
4 performing calculations and indicated suicidal ideation (exhibit 13F:6-8). That
5 suggests some difficulty, but her mental status was generally intact, which is not
6 entirely consistent with marked limitations and disability. The assessment is also not
7 entirely consistent with the claimant’s activities reported by her and by other parties,
8 discussed below.

9 Tr. 19. Thus, the ALJ declined to give Dr. Nelson’s report substantial weight. Id. The undersigned agrees
10 with plaintiff that this too was error.

11 Plaintiff asserts that in rejecting Dr. Nelson’s opinion, the ALJ improperly substituted her own lay
12 opinion for his. As discussed above, it is improper for an ALJ to substitute his or her opinion for that of a
13 medical source. While it is appropriate for an ALJ to reject a medical source opinion which is
14 inadequately supported by clinical or objective findings, as set forth above, Dr. Nelson did provide a fairly
15 detailed description of his own clinical findings. See Batson, 359 F.3d at 1195. It is clear the ALJ
16 disagrees with those findings, but her description of plaintiff’s mental status as being generally intact
17 ignores the poor cognitive and other mental functional symptoms plaintiff was noted to have displayed,
18 and which were set forth by Dr. Nelson as the basis for his limitations ratings. Tr. 349. In addition,
19 although it may be appropriate to discount medical findings that are inconsistent with specific activities
20 demonstrated in the record, the ALJ fails to explain which such activities discounted what findings.

21 D. Dr. Hakala

22 Plaintiff was examined by Michael C. Hakala, D.O., in late March 2002. Plaintiff was able to sit,
23 stand, rise, and walk without any problem, her sensation and reflexes were normal, and she had largely
24 negative straight leg testing. Tr. 314. While plaintiff exhibited some left thigh pain and pain with pressure
25 on her left trochanter, she was able to squat and rise satisfactorily and stand on her heels and toes and on
26 her left and right legs individually without problem. Id. There also was no evidence of tremor or wasting.
27 Id. Dr. Hakala assessed plaintiff with “a history of lumbar or T12 fracture with some symptoms of left hip
28 degeneration.” Id. In addition, plaintiff had “minor limitation to left hip motion,” which was “not evident in
walking,” and “minor limitation to her left shoulder motions.” Tr. 314-15. Dr. Hakala concluded by
stating as follows: “As far as I can see at this time is physical limitation and her ability to perform work-
related activities.” Tr. 315.

1 The ALJ addressed Dr. Hakala's report and findings as follows:

2 Dr. Hakala did not assess particular limitations. This report is given some weight, but
3 the language of the assessment is not particularly clear and this report is not entirely
4 helpful. Nevertheless, Dr. Hakala did not find any objectively observable limits in
range of motion, which suggests that the claimant's physical functioning was better
than she has alleged.

5 Tr. 18. Plaintiff argues the ALJ erred here by obviously misinterpreting Dr. Hakala's report. Although it
6 is unclear what plaintiff means by this, the undersigned finds no error here on the part of the ALJ. First,
7 Dr. Hakala's report is not particularly clear concerning what physical limitations he believed plaintiff to
8 have. For example, he noted only "minor" limitations in plaintiff's left hip and shoulder motion. Further,
9 while Dr. Hakala did mention "physical limitation" and "ability to perform work-related activities," he did
10 not state what those limitations or ability were. Thus, although there may have been "objectively
11 observable" range of motion limitations in the report, those limitations indeed are hardly helpful here.

12 E. Compass Mental Health Records

13 Plaintiff argues the ALJ erred in discrediting certain mental health treatment records from Compass
14 Mental Health, where plaintiff received mental health counseling. With respect to those records, the ALJ
15 found in relevant part as follows:

16 In February 2003 the claimant began treatment at Compass Mental Health; she denied
17 any current drug use. She was assessed with amphetamine (provisional) and PTSD,
with a GAF of 45 (exhibit 17F:4). That assessment suggests possible disability, but the
18 claimant's mental status functioning was pretty good (exhibit 17F:29-31). That
assessment is not persuasive. Compass Mental Health discharged the claimant for non-
19 attendance, in July 2003 (exhibit 17F:1). That may have been due to the claimant's
pregnancy and other family issues at the time. . . .

20 Tr. 18-19. Specifically, plaintiff asserts the ALJ erred by picking and choosing those aspects indicating
21 the absence of disability. The undersigned, however, finds no error here.

22 The February 2003 assessment was not conducted by an "acceptable medical source," as that term
23 is defined in the Social Security Regulations, and thus may be given less weight than those of acceptable
24 medical sources, e.g., licensed psychiatrists or psychologists. Tr. 387; See Gomez v. Chater, 74 F.3d 967,
25 970-71 (9th Cir. 1996); 20 C.F.R. § 404.1513(a), (d), § 416.913(a), (d). The opinions of non-acceptable
26 medical sources such as mental health therapists or counselors, instead generally are treated in the same
27 manner lay witness testimony. See 20 C.F.R. § 404.1513(d), § 416.913(d) (Commissioner may also use
28 evidence from other sources to show the severity of claimant's impairment(s) and how those impairments

1 affects his or her ability to work).

2 In addition, in discounting the testimony of lay witnesses, the ALJ need only give “reasons
3 germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d, 503, 511 (9th Cir. 2001). Further, when
4 rejecting lay testimony, the ALJ need not cite to the specific record as long as “arguably germane reasons”
5 for dismissing the testimony are noted, even though the ALJ does “not clearly link his determination to
6 those reasons,” and substantial evidence supports the ALJ’s decision. Lewis, 236 F.3d at 512. The ALJ
7 also may “draw inferences logically flowing from the evidence.” Sample, 694 F.2d at 642.

8 Here, the ALJ discounted the low GAF score assessed during plaintiff’s intake evaluation because
9 it conflicted with her mental status functioning, which the ALJ found to be “pretty good.” Lewis, 236 F.3d
10 at 511 (ALJ may discount lay testimony if it conflicts with medical evidence); see also Vincent v. Heckler,
11 739 F.2d 1393, 1395 (9th Cir. 1984) (proper for ALJ to discount lay testimony that conflicts with available
12 medical evidence). Indeed, plaintiff’s mental status examination at the time fails to show any significant,
13 let alone, disabling mental limitations. See Tr. 387-90. Plaintiff points to some comments she made about
14 killing herself, but those comments specifically referred to her past state of mind, and she made clear at the
15 time that she did not want to kill herself currently or in the near future. Tr. 389. While plaintiff also points
16 to a mid-July 2003 transition summary – in which she, as the ALJ noted, she was discharged, and in which
17 again she was assessed with a GAF score of 45 – she cites no specific mental status examination findings
18 that contradict the fairly unremarkable earlier findings.

19 The ALJ also made the following findings concerning the Compass Mental Health records:

20 In October 2004 the claimant began treatment at Comprehensive Mental Health, for
21 depressive disorder NOS, amphetamine use, and a GAF of 35 (exhibit 19F). The
22 claimant made many telephone calls to the Comprehensive staff, complaining of
23 suicidal ideation. When her counselors talked to the claimant, she usually said that she
24 actually had called up because she wanted someone to talk to (exhibit 19F:1-6)! The
25 claimant’s purported suicidal thoughts appear to be an attention-getting device, or to
26 give her an opportunity for social interaction.

27 Tr. 19. Plaintiff argues these findings are a grave misinterpretation of those records. While that may be a
28 bit of an overstatement, the undersigned does agree that the ALJ erred in discounting plaintiff’s credibility
concerning her suicidal ideation here. That is, although in late October 2004, it may have been reported
that plaintiff called merely for the purpose of talking to someone, there is no indication she did this more
than once, let alone on a regular basis. Tr. 423-28. Rather, it appears that in recording subsequent contacts

1 with plaintiff, the basis for the original late October 2004 contact merely was re-noted.

2 In addition, other evidence in the record shows plaintiff's suicidal ideation to have been present at
 3 times, with no indication of a lack of veracity with respect thereto, though its presence certainly has not
 4 been consistent. See Tr. 262-63, 265, 273, 283, 309, 313, 353, 389, 425, 498, 500, 502, 504-05, 507, 528.
 5 Indeed, no medical source in the record, acceptable or otherwise, has found or opined that plaintiff has not
 6 been truthful regarding her depression or her periods of suicidal ideation. As such, the undersigned finds
 7 this to be an invalid reason both for discounting plaintiff's credibility on this issue, and for rejecting the
 8 low GAF score assessed at the time. This does not mean the ALJ was required to accept that score. It
 9 does mean, however, that the ALJ was required to provide a more germane reason for rejecting it. See
 10 Howard v. Commissioner of Social Security, 276 F.3d 235, 241 (6th Cir. 2002) (GAF score may be of
 11 considerable help to ALJ, but is not essential to assessment of claimant's residual functional capacity, and
 12 ALJ's failure to reference it alone does not make that assessment inaccurate).

13 F. Dr. Dzurilla and Dr. Larson

14 Plaintiff argues the ALJ erred in finding as follows:

15 On March 3, 2005, Dr. [Marta] Dzurilla reported that the claimant had a left pelvic tilt
 16 and pain, with markedly limited hip range of motion (exhibit 21F:9). But a March
 17 2005 MRI showed the claimant's bilateral hip arthropathy, left greater than right,
 18 without significant compromise (exhibit 21F:15-16). Those findings are consistent
 19 with the claimant's complaints of mild pain and do not corroborate a "severely limited"
 20 range of motion. In fact, on March 2, 2005, Dr. Dzurilla noted that the claimant's hips
 21 were pain free and with full range of motion (exhibit 21F:7). That was apparently in
 response to bursal injections (exhibit 21F:2). On March 30, 2005, Dr. Dzurilla reported
 that the claimant as able to return to regular work (exhibit 21F:13), consistent with the
 rather mild clinical findings. This statement is from a treating source and it has some
 consistency with the rather mild clinical findings. This statement is from a treating
 source and it has some consistency with Dr. Dzurilla's notes. It is given fairly
 substantial weight.

22 Tr. 19. Plaintiff notes correctly that the March 3, 2005 report actually was dated March 1, 2005, and was
 23 written by Todd D. Larson, M.D. Tr. 459. These facts, however, do not help plaintiff. First, the mere fact
 24 that it was Dr. Larson and not Dr. Dzurilla who issued the March 3, 2005 report does not alone establish
 25 the ALJ erred in finding overall that plaintiff exhibited fairly mild physical limitations.

26 Second, the fact that Dr. Larson's report is dated prior to those of Dr. Dzurilla further supports the
 27 ALJ's findings. For example, although Dr. Larson noted that plaintiff had markedly limited hip range of
 28 motion "with complaints of significant hip and thigh pain" on March 1, 2005 (id.), Dr. Dzurilla found no

1 hip tenderness and full range of motion the next day (Tr. 457-58). As further noted by the ALJ, plaintiff
2 was reported by Dr. Dzurilla as being able to return to regular work on March 30, 2005 (Tr. 463), which
3 the ALJ reasonably found to be consistent with the more mild findings reported by Dr. Dzurilla on March
4 2, 2005. As such, the undersigned finds no error here.

5 Plaintiff argues that plaintiff was prescribed medications by Dr. Larson during her March 1, 2005
6 examination by him. As such, plaintiff argues that it is conceivable those prescribed medications relieved
7 some of her symptoms associated with the limited range of motion Dr. Larson found, stating further that
8 high doses of those medications obviously created “immediate, yet temporary, relief of symptoms.” (Dkt.
9 #17, p. 18). Whether or not it is conceivable, however, misses the point. If the evidence admits of more
10 than one rational interpretation, the Court must uphold the ALJ’s determination. Allen, 749 F.2d at 579.
11 Second, even if it was the medications that caused the change noted above, plaintiff points to no evidence
12 that such relief was only temporary or would not offer continued relief. See Morgan v. Commissioner of
13 Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999) (ALJ may discount claimant’s credibility on basis
14 of medical improvement); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998).

15 Plaintiff asserts other evidence in the record shows she repeatedly has reported her pain being at
16 the level of 8 out of 10 or higher. However, the weight of the medical evidence in the record shows
17 otherwise. In mid-December 2001, plaintiff’s hip pain was noted to be only 3 out of 10. Tr. 295. In late
18 March 2002, although plaintiff reported that her left leg and hip “bothered” her, she also stated that she
19 “just deals with it, and the pain that comes on does resolve eventually.” Tr. 313. Little in the way of hip
20 pain was noted on examination, and plaintiff was noted to have just “minor limitation” in hip motion. Tr.
21 314-15. Plaintiff was at most only “mildly tender” in October and December 2004. Tr. 437, 439-40. In
22 mid-February 2005, plaintiff reported being moderately tender there. Tr. 461. While the record does
23 contain other reports of pain, none indicate the level asserted by plaintiff here. See Tr. 514, 516, 521, 524-
24 27.

25 Lastly, plaintiff argues that a mid-March 2005 MRI report contains a diagnosis of “[s]eronegative
26 spondyloarthropathy, as evidenced by sacriolitis and bilateral hip athropathy, left greater than right.” Tr.
27 465. Although such objective clinical findings may be sufficient to show plaintiff suffers from a medically
28 determinable impairment, “[t]he mere existence of an impairment is insufficient proof of a disability,” let

1 alone significant work-related limitations. Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993); Tackett
2 v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (claimant must show existence of medically determinable
3 impairment). As such, the MRI alone is not proof of disabling pain.

4 II. The ALJ's Step Three Analysis Was Proper

5 At step three of the sequential disability evaluation process, the ALJ must evaluate the claimant's
6 impairments to see if they meet or equal any of the impairments listed in 20 C.F. R. Part 404, Subpart P,
7 Appendix 1 (the "Listings"). 20 C.F.R § 404.1520(d), § 416.920(d); Tackett, 180 F.3d at 1098. If any of
8 the claimant's impairments meet or equal a listed impairment, he or she is deemed disabled. Id. The
9 burden of proof is on the claimant to establish he or she meets or equals any of the impairments in the
10 Listings. Tackett, 180 F.3d at 1098.

11 A mental or physical impairment "must result from anatomical, physiological, or psychological
12 abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques."
13 20 C.F.R. § 404.1508, § 416.908. It must be established by medical evidence "consisting of signs,
14 symptoms, and laboratory findings." Id. An impairment meets a listed impairment "only when it manifests
15 the specific findings described in the set of medical criteria for that listed impairment." SSR 83-19, 1983
16 WL 31248 *2. An impairment equals a listed impairment "only if the medical findings (defined as a set of
17 symptoms, signs, and laboratory findings) are at least equivalent in severity to the set of medical findings
18 for the listed impairment." Id. at *2. However, "symptoms alone" will not justify a finding of equivalence.
19 Id.

20 In the "Findings" section of her decision, the ALJ found that while plaintiff had those impairments
21 noted above in step two as being severe, none of them met or equaled the criteria in the Listings. Tr. 22.
22 Plaintiff argues the ALJ "offered absolutely no support for this finding." (Dkt. #17, p. 28). It is true that
23 the ALJ "must evaluate the relevant evidence before concluding that a claimant's impairments do not meet
24 or equal a listed impairment." Lewis, 236 F.3d at 512. Thus, a mere "boilerplate finding is insufficient to
25 support a conclusion that a claimant's impairment does not do so." Id. Were this the only finding the ALJ
26 made at step three of the disability evaluation process, plaintiff might have a point.

27 In the body of her decision, however, after determining the "severe" impairments plaintiff had, the
28 ALJ then went on to find as follows:

1 The next step is to determine whether the claimant's impairments meet or equal
 2 requirements set forth in the Listing of Impairments (20 C.F.R., Part 404, Subpart P,
 3 Appendix 1). As discussed below, the claimant's impairments do not meet or equal the
 4 criteria of any listing.

5 Tr. 17. After discussing the medical evidence in the record (Tr. 17-20), the ALJ then went on to make the
 6 following additional findings:

7 DDS psychologists reviewed the file in April and September 2002 and determined that
 8 the claimant had rule-out bipolar disorder, low average IQ, and substance abuse
 9 disorder. These impairments caused mild difficulty with daily living activities,
 10 moderate difficulty with social functioning, and moderate to possibly marked difficulty
 11 with concentration, persistence, and pace. There were no extended episodes of
 12 decompensation. The claimant's condition did not meet the "B" or "C" criteria of a
 13 listing (exhibit 9F).

14 Tr. 20-21. This discussion and interpretation of the medical evidence in the record is sufficient to make a
 15 valid step three determination.

16 It should be noted, furthermore, that the ALJ need not "state why a claimant failed to satisfy every
 17 different section of the listing of impairments." Gonzalez v. Sullivan, 914 F.2d 1197, 1201 (9th Cir. 1990)
 18 (ALJ did not err in failing to state what evidence supported conclusion that, or discuss why, claimant's
 19 impairments did not meet or exceed Listings). This is particularly true where the claimant has failed to set
 20 forth any reasons as to why the Listing criteria have been met or equaled. Lewis v. Apfel, 236 F.3d 503,
 21 514 (9th Cir. 2001) (ALJ's failure to discuss combined effect of claimant's impairments was not error, as
 22 claimant offered no theory as to how, or point to any evidence to show, his impairments combined to equal
 23 listed impairment). As plaintiff has not set forth any reasons as to why the Listing criteria have been met
 24 or equaled in this case, the undersigned finds no error here.

25 III. The ALJ Erred in Assessing Plaintiff's Credibility

26 Questions of credibility are solely within the control of the ALJ. Sample v. Schweiker, 694 F.2d
 27 639, 642 (9th Cir. 1982). The Court should not "second-guess" this credibility determination. Allen, 749
 28 F.2d at 580. In addition, the Court may not reverse a credibility determination where that determination is
 based on contradictory or ambiguous evidence. Id. at 579. That some of the reasons for discrediting a
 claimant's testimony should properly be discounted does not render the ALJ's determination invalid, as
 long as that determination is supported by substantial evidence. Tonapetyan v. Halter, 242 F.3d 1144, 1148
 (9th Cir. 2001).

To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent reasons for

1 the disbelief.” Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted). The ALJ “must
 2 identify what testimony is not credible and what evidence undermines the claimant’s complaints.” Id.;
 3 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the claimant is
 4 malingering, the ALJ’s reasons for rejecting the claimant’s testimony must be “clear and convincing.”
 5 Lester, 81 F.2d at 834. The evidence as a whole must support a finding of malingering. O’Donnell v.
 6 Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

7 In determining a claimant’s credibility, the ALJ may consider “ordinary techniques of credibility
 8 evaluation,” such as reputation for lying, prior inconsistent statements concerning symptoms, and other
 9 testimony that “appears less than candid.” Smolen v. Chater, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ
 10 also may consider a claimant’s work record and observations of physicians and other third parties
 11 regarding the nature, onset, duration, and frequency of symptoms. Id.

12 Here, the ALJ found plaintiff’s statements concerning her impairments and limitations to be not
 13 entirely credible in light of the medical and other evidence in the record. Tr. 18. A determination that a
 14 claimant’s complaints are “inconsistent with clinical observations” can satisfy the clear and convincing
 15 requirement. Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1297 (9th Cir. 1998). However, a
 16 claimant’s pain testimony may not be rejected “solely because the degree of pain alleged is not supported
 17 by objective medical evidence.” Orteza v. Shalala, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting Bunnell v.
 18 Sullivan, 947 F.2d 341, 346-47 (9th Cir.1991) (en banc)) (emphasis added); see also Rollins v. Massanari,
 19 261 F.3d 853, 856 (9th Cir.2001); Fair v. Bowen, 885 F.2d 597, 601 (9th Cir. 1989); Byrnes v. Shalala, 60
 20 F.3d 639, 641-42 (9th Cir. 1995).

21 As discussed above, the ALJ erred in discounting much of the medical opinion evidence in the
 22 record concerning plaintiff’s mental impairments and limitations. Thus, to the extent the ALJ relied on her
 23 interpretation of that evidence to discount plaintiff’s credibility, she erred. On the other hand, also as
 24 discussed above, plaintiff has failed to show the ALJ erred to any meaningful extent in evaluating the
 25 medical evidence in the record regarding her physical impairments and limitations. As such, to the extent
 26 the ALJ relied on that evidence and her interpretation thereof to discount plaintiff’s credibility, there has
 27 been no error on the part of the ALJ.

28 The ALJ also discounted plaintiff’s credibility for the following reasons:

1 . . . The claimant has reported that she does household chores, shops, does puzzles,
2 takes some walks or uses public transportation, and plays cards with friends (exhibit
3 5E). She reported that during period [sic] of homelessness she spent most of the day
4 walking about, up to 3 hours at a time, looking for shelter (exhibit 10E). The claimant
5 said that her boyfriend helped with some of the chores and child care. These activities
6 suggest that the claimant is capable of a fair amount of activity on a regular basis.

7 The claimant was unable to state with any certainty when or even if she stopped using
8 methamphetamine; she said that it was possibly a year, and she also reported that she
9 last used drugs in February 2002 (exhibit 11E). She also testified that she really did not
10 know how long she had been clean and sober. She testified to several episodes when
11 she was not getting out of bed for several days, and essentially not caring for her child,
12 which was not persuasive. The claimant is apparently able to make and keep
13 appointments with her doctor, it is difficult to accept that she does not care for her
14 child. The doctors treating her physical complaints do not mention any appearance or
15 concern with respect to her substance use.

16 Tr. 20. Plaintiff argues that in so finding, the ALJ failed to cite specific reasons for finding her to be not
17 fully credible. While the above findings do contain specific reasons, the undersigned finds those reasons
18 are not legitimate.

19 To determine whether a claimant's symptom testimony is credible, the ALJ may consider his or her
20 daily activities. Smolen, 80 F.3d at 1284. Such testimony may be rejected if the claimant "is able to spend
21 a substantial part of his or her day performing household chores or other activities that are transferable to a
22 work setting." Id. at 1284 n.7. The claimant need not be "utterly incapacitated" to be eligible for disability
23 benefits, however, and "many home activities may not be easily transferable to a work environment." Id.
24 Such appears to be the case here.

25 The record fails to indicate that the activities the ALJ noted in the first paragraph above have been
26 performed on a sufficient basis to be considered transferrable to the work place. Reports from plaintiff and
27 others who know her, for example, do not necessarily show she engages in activities of daily living, such
28 as cleaning, cooking and shopping, for a substantial part of her day, or performs them at a pace conducive
to the work setting. See Tr. 149-51, 156-58, 174, 187-88, 310, 313, 552, 554, 557. Further, while the
ability to walk around for three hours at a time may be indicative of an ability to stand for significant
periods of time while on the job, it sheds little light on the ability to perform daily activities.

In terms of plaintiff's drug use, the fact that plaintiff could not accurately report exactly when she
became clean and sober does not in itself indicate dishonesty on this issue. She actually may not be able to
remember when she stopped using drugs. Indeed, nothing in plaintiff's own reports or in the findings and
opinions of the medical sources in the record indicate a lack of truthfulness here. Without such evidence,

1 it was not reasonable for the ALJ to use such testimony to impeach plaintiff's credibility.

2 Similarly, merely because the ALJ finds it hard to believe plaintiff's testimony that she would not
3 get out of bed for several days at a time does not mean plaintiff was not being truthful. That is, to discount
4 plaintiff's credibility for this reason, the ALJ must be able to point to at least some evidence in the record
5 that would call plaintiff's testimony into question. In other words, the ALJ may not simply rely on her
6 own beliefs to discount a claimant's credibility. In addition, an ability to keep appointments is not
7 necessarily incompatible with an inability to care for a child. The latter task requires far different, and
8 often far more difficult, responsibilities than the former.

9 It is true that merely because one or more of the reasons for discounting a claimant's credibility has
10 been found to be improper, this does not mean the ALJ's credibility determination must be deemed invalid,
11 as long as that determination is supported by substantial evidence in the record. Tonapetyan, 242 F.3d at
12 1148. Such is not the case here. As discussed above, to the extent the ALJ relied on inconsistencies
13 between plaintiff's complaints and the objective medical evidence in the record concerning her physical
14 limitations to discount her credibility, there was no error. However, the remaining, and thus majority of
15 the, reasons the ALJ gave for discounting plaintiff's credibility were not legitimate, and thus not clear and
16 convincing. As such, the ALJ erred overall in discounting plaintiff's credibility.

17 IV. The ALJ Erred in Assessing Plaintiff's Residual Functional Capacity

18 If a disability determination "cannot be made on the basis of medical factors alone at step three of
19 the evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and
20 assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A
21 claimant's residual functional capacity assessment is used at step four to determine whether he or she can
22 do his or her past relevant work, and at step five to determine whether he or she can do other work. Id. It
23 thus is what the claimant "can still do despite his or her limitations." Id.

24 A claimant's residual functional capacity is the maximum amount of work the claimant is able to
25 perform based on all of the relevant evidence in the record. Id. However, a claimant's inability to work
26 must result from his or her "physical or mental impairment(s)." Id. Thus, the ALJ must consider only
27 those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a
28 claimant's residual functional capacity, the ALJ also is required to discuss why the claimant's "symptom-

1 related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the
2 medical or other evidence.” Id. at *7.

3 Here, the ALJ assessed plaintiff with the following residual functional capacity:

4 . . . [T]he claimant has retained the residual functional capacity to lift and carry 20
5 pounds occasionally and 10 pounds frequently. She can sit and stand/walk 6 hours
6 each in a workday. She can occasionally stoop, crouch, and crawl, and climb ropes,
ladders, and scaffolds. She is limited at working overhead and exposure to vibrations.

7 . . . the claimant’s mental impairments cause moderate limitations at daily living
8 activities, social functioning, concentration, persistence and pace. . . . She can perform
simple, repetitive, routine tasks. She should have no frequent work changes and only
limited public interaction.

9 Tr. 21.

10 A. Plaintiff’s Obesity

11 Plaintiff first argues the ALJ erred in assessing her with the above residual functional capacity by
12 not addressing her diagnosed obesity. The ALJ found plaintiff’s obesity to be “not so significant as to be a
13 severe impairment,” but stated that she did take it “into account.” Tr. 20. The ALJ did not expand further
14 on this, but plaintiff has not shown what limitations stemming from her obesity the ALJ should have taken
15 into account or included in her residual functional capacity. Plaintiff argues that individuals with obesity
16 may suffer from a number of exertional and non-exertional limitations. However, plaintiff still must come
17 forth with evidence establishing how she is so limited. Plaintiff has not done so, nor does a review of the
18 medical evidence in the record reveal any work-related limitations stemming therefrom.

19 B. Dr. Fisher and Dr. Comrie

20 A psychiatric review technique form was completed by Alex Fisher, Ph.D., in late April 2002, and
21 affirmed by Mathew Comrie, Psy.D., in late September 2002. Drs. Fisher and Comrie, both of whom are
22 non-examining consulting psychologists, found plaintiff to have mild restrictions in her activities of daily
23 living, moderate difficulties in social functioning and maintaining concentration, persistence and pace, and
24 no episodes of decompensation without the effects of drug and alcohol abuse. Tr. 328. With the effects of
25 alcohol and drug abuse, they found she had marked difficulties in maintaining concentration, persistence
26 or pace. Id. In addition, Dr. Fisher and Comrie stated that plaintiff “should be able to carry out repetitive
27 tasks if absent” drug and alcohol abuse. Tr. 330.

28 In addition to the psychiatric review technique form, Drs. Fisher and Comrie at the same time filled

1 out a mental residual functional capacity assessment form. Without the effects of drug and alcohol abuse,
2 plaintiff was noted to be moderately limited in her ability to: understand, remember and carry out detailed
3 instructions; maintain attention and concentration; complete a normal workday and workweek; perform at
4 a consistent pace; interact appropriately with the general public; get along with co-workers or peers; and
5 respond appropriately to changes in the work setting. Tr. 332-34. With such abuse, plaintiff was found to
6 be markedly limited in her ability to: perform activities within a schedule; maintain regular attendance; be
7 punctual; complete a normal workday and workweek; perform at a consistent pace; and be aware of
8 normal hazards and take appropriate precautions. Tr. 333-34. Dr. Fisher and Comrie concluded as follows:

9 A) Intellectual limitations and ongoing depression combine to limit clmt [claimant] to
10 understanding and remembering simple instructions. B) When clmt is very severely
11 depressed, she will have difficulty maintaining attention and concentration for long
12 periods. Most of the time she would be capable of carrying out repetitive tasks as the
13 record show that her sx [symptoms] of depression do respond to tx [treatment] when
14 she is not under DAA [drug and alcohol abuse] influence. C) Clmt can be irritable
15 when severely depressed and is not always cooperative with others. D) would have
16 problems with rapid changes at work secondary to intellectual deficits.

17 Tr. 334.

18 The ALJ found the findings of Dr. Fisher and Dr. Comrie to be “somewhat consistent with the
19 evidence,” and stated he was giving them “a degree of consideration,” but determined that plaintiff did not
20 “appear to have any marked limitations in functioning.” Tr. 21. The ALJ then went on to state that their
21 “assessment of specific functioning” would be “given great weight.” Id. Plaintiff argues that in assessing
22 her residual functional capacity, the ALJ failed to take into consideration many of the moderate to marked
23 mental functional limitations Drs. Fisher and Comrie found she had. The undersigned agrees.

24 The only such limitations the ALJ included in the residual functional capacity assessment were
25 those relating to plaintiff’s ability to perform simple, repetitive and routine tasks, frequent work changes,
26 and public interaction. Left out was any mention of the moderate limitation on maintaining attention and
27 concentration, performing at a consistent pace, and getting along with co-workers and peers. Given that
28 the ALJ placed “great weight” on the “assessment of specific functioning” provided by Dr. Fisher and Dr.
Comrie, such failure to consider these other moderate limitations constituted error.

Plaintiff further argues the ALJ also erred in not mentioning many of the marked limitations Drs.
Fisher and Comrie found she had, such as in her ability to perform activities within a schedule, maintain
regular attendance, be punctual, complete a normal workday and workweek, perform at a consistent pace,

1 and be aware of normal hazards and take appropriate precautions. As noted above, however, Dr. Fisher
2 and Dr. Comrie expressly indicated that she would be so limited only in the presence of drug and alcohol
3 abuse. It is unclear though, whether such abuse was present. Indeed, plaintiff herself now states that her
4 substance abuse disorder was “mostly by history with little to no current evidence of abuse.” (Dkt. #17, p.
5 21). On the other hand, the ALJ’s failure to consider this issue here was erroneous as well.

6 C. Other Errors

7 Lastly, plaintiff further argues that the ALJ incorrectly assessed her residual functional capacity.
8 Other than with respect to those errors already addressed above, however, plaintiff fails to state with any
9 specificity how else she feels the ALJ erred here. The undersigned does note though that in light of the
10 errors discussed above that the ALJ made in evaluating the medical opinion source evidence in the record
11 concerning plaintiff’s mental limitations, it cannot be said the residual functional capacity assessed by the
12 ALJ fully took into account all such limitations contained therein. To the extent those limitations are
13 supported by the substantial evidence in the record, the ALJ erred. On the other hand, given that plaintiff
14 has failed to show any relevant errors committed by the ALJ in assessing her physical residual functional
15 capacity, the ALJ’s assessment thereof was proper.

16 V. The ALJ Erred in Finding Plaintiff Was Capable of Her Past Relevant Work

17 Plaintiff has the burden at step four of the disability evaluation process to show that she is unable to
18 return to her past relevant work. Tackett, 180 F.3d at 1098-99. Plaintiff argues the ALJ erred in finding
19 her capable of returning to her past relevant work based on the hypothetical question he posed to the
20 vocational expert at the hearing. That question contained substantially similar physical and mental
21 limitations as were included in the residual functional capacity with which the ALJ assessed plaintiff. Tr.
22 571-72. In response thereto, the vocational expert testified that plaintiff could perform her past relevant
23 work as a housekeeper. Tr. 572. Based on the vocational expert’s testimony, the ALJ found plaintiff
24 capable of returning to that job, and therefore not disabled. Tr. 21.

25 An ALJ’s findings will be upheld if the weight of the medical evidence supports the hypothetical
26 posed by the ALJ. Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987); Gallant v. Heckler, 753 F.2d
27 1450, 1456 (9th Cir. 1984). The vocational expert’s testimony therefore must be reliable in light of the
28 medical evidence to qualify as substantial evidence. Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988).

1 Accordingly, the ALJ's description of the claimant's disability "must be accurate, detailed, and supported
2 by the medical record." Embrey, 849 F.2d at 422 (citations omitted). The ALJ, however, may omit from
3 that description those limitations he or she finds do not exist. Rollins v. Massanari, 261 F.3d 853, 857 (9th
4 Cir. 2001).

5 As discussed above, the ALJ erred in evaluating the medical opinion evidence in the record
6 regarding plaintiff's mental functional limitations, and, for the same reason, in assessing her residual
7 functional capacity. Given those errors, it cannot be said that the ALJ's description of plaintiff contained
8 in the hypothetical question was accurate. As such, the undersigned agrees with plaintiff that the above
9 hypothetical question cannot be upheld at this time, or provide the basis for the ALJ's determination that
10 plaintiff is not disabled at step four of the sequential evaluation process.

11 VI. Plaintiff's Ability to Perform Other Jobs

12 If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation
13 process the ALJ must show there are a significant number of jobs in the national economy the claimant is
14 able to do. Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do
15 this through the testimony of a vocational expert or by reference to the Commissioner's Medical-
16 Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157,
17 1162 (9th Cir. 2000).

18 At the hearing, in addition to the above hypothetical question, the ALJ also posed the following
19 hypothetical question to the vocational expert:

20 [A]ssuming I were to find the claimants [sic] testimony credible and supported by the
21 medical evidence. The claimant has indicated that she is limited to standing, walking,
22 or sitting for 20 minutes without having to change position, change from one to the
23 other and then she could resume that activity. She can at least occasionally, lift up to
24 20 to 27 pounds, but couldn't lift and carry throughout the course of the day . . .
25 [plaintiff's] son . . .

26 . . . she does not have any manual limitations or restrictions and she has non-exertional
27 limitations or restrictions, which would again limit her to the performance of simple
28 repetitive tasks. . . . she has a learning disability and visual auditory and expressive
discrimination . . . So she would be limited to simple repetitive routine tasks that could
perhaps be demonstrated to her as opposed to her having to read or get some oral
explanation of how that job is performed. She would be limited in her ability to
interact appropriately with members of the public so she'd have minimal public
interaction and also minimal interaction with supervisors and co-workers.

Tr. 572-73. In response thereto, the vocational expert testified that with the physical restrictions contained

1 therein, she did not know of any jobs that “would be reasonably probable” plaintiff could do. Tr. 574.

2 Plaintiff argues the ALJ erred in failing to address the above hypothetical question and vocational
3 expert’s response to that question in her decision. As discussed above, however, although the ALJ did err
4 in rejecting plaintiff’s testimony, he did not do so with respect to her physical limitations, or in evaluating
5 the medical evidence in the record concerning those limitations. Because the vocational expert’s response
6 is based entirely on the additional physical limitations added to the second hypothetical question, the ALJ
7 was not required to adopt either those limitations or the vocational expert’s response thereto. Accordingly,
8 the undersigned finds no error on the part of the ALJ here.

9 Plaintiff also argues the ALJ should have adopted three additional limitations posed by her counsel
10 to the vocational expert. Specifically, at the hearing plaintiff’s counsel asked the vocational expert
11 whether a requirement for more frequent rest breaks or interruptions from the workforce because of
12 psychological and mental issues would further complicate the ability to work of the individual described in
13 the second hypothetical. Tr. 574. The vocational expert testified that such would be the case if the
14 problem described was continuous. Id. The vocational expert also appeared to testify that if the individual
15 was unable to meet certain quota requirements or production limits, that would be a problem as well. Id.
16 Lastly, the vocational expert testified that if an individual were to consistently miss more than two days of
17 work per month for a period of several months on a repetitive basis, there would be a risk of termination.
18 Tr. 575.

19 The problem with plaintiff’s argument with respect to the above limitations, however, is that she
20 has not shown that those limitations are supported by the substantial evidence in the record. Indeed, no
21 medical opinion source has opined that plaintiff likely would miss more than two days of work per month,
22 let alone do so consistently for a period of several months. In addition, it is not clear plaintiff would not be
23 able to meet quota or production requirements, or even what those requirements are. Finally, no medical
24 source in the record again specifically has opined as to plaintiff’s need for rest breaks, or commented that
25 any such rest breaks would need to occur on a frequent basis. Accordingly, the undersigned finds the ALJ
26 did not err in excluding these limitations from his hypothetical question.

27 VII. This Matter Should Be Remanded for Further Administrative Proceedings

28 The Court may remand this case “either for additional evidence and findings or to award benefits.”
Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s decision, “the proper course,

1 except in rare circumstances, is to remand to the agency for additional investigation or explanation.”
 2 Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual case in
 3 which it is clear from the record that the claimant is unable to perform gainful employment in the national
 4 economy,” that “remand for an immediate award of benefits is appropriate.” Id.

5 Benefits may be awarded where “the record has been fully developed” and “further administrative
 6 proceedings would serve no useful purpose.” Smolen, 80 F.3d at 1292; Holohan v. Massanari, 246 F.3d
 7 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant’s]
 9 evidence, (2) there are no outstanding issues that must be resolved before a
 10 determination of disability can be made, and (3) it is clear from the record that the ALJ
 11 would be required to find the claimant disabled were such evidence credited.

12 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002). Because
 13 issues still remain with respect to the nature and extent of plaintiff’s mental functional limitations, her
 14 residual functional capacity, her ability to return to her past relevant work, this matter should be remanded
 15 to the Commissioner for further administrative proceedings.

16 It is true that where the ALJ has failed “to provide adequate reasons for rejecting the opinion of a
 17 treating or examining physician,” that opinion generally is credited “as a matter of law.” Lester, 81 F.3d at
 18 834 (citation omitted). However, where the ALJ is not required to find the claimant disabled on crediting
 19 of evidence, this constitutes an outstanding issue that must be resolved, and thus the Smolen test will not
 20 be found to have been met. Bunnell v. Barnhart, 336 F.3d 1112, 1116 (9th Cir. 2003). Further, “[i]n cases
 21 where the vocational expert has failed to address a claimant’s limitations as established by improperly
 22 discredited evidence,” the Ninth Circuit “consistently [has] remanded for further proceedings rather than
 23 payment of benefits.” Bunnell, 336 F.3d at 1116.

24 It also is true the Ninth Circuit has held that remand for an award of benefits is required where the
 25 ALJ’s reasons for discounting the claimant’s credibility are not legally sufficient, and “it is clear from the
 26 record that the ALJ would be required to determine the claimant disabled if he had credited the claimant’s
 27 testimony.” Connett v. Barnhart, 340 F.3d 871, 875 (9th Cir. 2003). The Court of Appeals in Connett went
 28 on to state, however, it was “not convinced” the “crediting as true” rule was mandatory. Id. Thus, at least
 where findings are insufficient as to whether a claimant’s testimony should be “credited as true,” it appears
 the courts “have some flexibility in applying” that rule. Id.; but see Benecke v. Barnhart, 379 F.3d 587,

593 (9th Cir. 2004) (applying “crediting as true” rule, but noting its contrary holding in Connett).³


Here, it is not clear that the ALJ would be required to find plaintiff disabled if the improperly rejected medical evidence in the record regarding her mental functional limitations were credited as true. It also is not clear, based on the all of the evidence in the record as a whole, that plaintiff’s testimony should be credited as true. Accordingly, remand for further administrative proceedings to address the remaining issues noted above is proper. In addition, if on remand, it is determined that plaintiff is incapable of returning to her past relevant work, the Commissioner should consider whether she is able to perform other jobs existing in significant numbers in the national economy.

CONCLUSION

Based on the foregoing discussion, the Court should find the ALJ improperly concluded plaintiff was not disabled, and should reverse the ALJ’s decision and remand this matter to the Commissioner for further administrative proceedings in accordance with the findings contained herein.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 72(b), the parties shall have ten (10) days from service of this Report and Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **March 21, 2008**, as noted in the caption.

DATED this 27th day of February, 2008.



Karen L. Strombom
United States Magistrate Judge

³In Benecke, the Ninth Circuit found the ALJ not only erred in discounting the claimant’s credibility, but also with respect to the evaluations of her treating physicians. Benecke, 379 F.3d at 594. The Court of Appeals credited both the claimant’s testimony and her physicians’ evaluations as true. Id. It also was clear in that case that remand for further administrative proceedings would serve no useful purpose and that the claimant’s entitlement to disability benefits was established. Id. at 595-96.